Supreme Court of the United States.

OCTOBER TERM 1904.

No. 27.

THE HELENA WATER WORKS COMPANY,
APPELLANT,

versus

THE CITY OF HELENA,
APPELLEE.

REPLY BRIEF OF APPELLANT.

It would seem from the briefs of appellee that the positions taken by the solicitors for appellant relative to the contract contained in Ordinance No. 248 are misunderstood. We have never contended in this case, and do not now contend, that by the passage and approval of Ordinance 248 and the acceptance thereof the city is precluded from furnishing itself with water. We concede that there is at this time no obligation on the part of appellee by virtue of this ordinance to purchase water from appellant. Even during the five-year period for which the Helena Consolidated Water Company contracted to supply the city with water and the city contracted to pay therefor, the city would not have violated any contract with the company if it had established a water-works system of its own and supplied itself with water, provided it continued to fulfil its promise to pay the company.

It is true that a contention is made on behalf of appellant

that the city of Helena should be restrained from acquiring a system and supply, other than that belonging to appellant, for the purpose of furnishing water to itself. This contention, however, is not based to any extent upon Ordinance No. 248, but is founded upon the proposition that under the constitution and laws of Montana the city is without power to acquire water works for the sole purpose of supplying itself with water, and also on the further proposition that, if it desires to own a supply and system, it is required to take the supply and system of appellant because of the provisions of subdivision 64 of section 4,800 of the Political Code of Montana as amended. (Appellant's original brief, pages 43 to 48, inclusive.)

The position taken by appellant is that by Ordinance 248 the city has precluded itself from engaging in the commercial business of furnishing water to its inhabitants. We maintain that by the contract contained in this ordinance the Helena Consolidated Water Company for itself, its successors and assigns, expressly agreed to furnish water to all of the inhabitants of the city during "the term of the agreement," which we assert to be twenty years, and that by reason of the contractual obligation thus assumed by the company there is the implied promise or undertaking on the part of the city that it will not during such period become a competitor of appellant. As what is implied in a contract is as much a part of the contract as what is expressed, the case is identical with the Walla Walla case. The fact that in the ordinance involved in the Walla Walla case there was a provision authorizing the city to purchase or condemn the water supply and system of the Walla Walla Water Company does not distinguish that case from the case at bar, as the right to purchase or condemn existed independently of the provisions of the ordinance regarding the matter.

Long Island Water Supply Co. v. *Brooklyn*, 166 U.S. 685.

The position of appellant with reference to the implied contract is attempted to be met by the following claims: first, that the term of the agreement mentioned in section 26 of the ordinance is five years; second, that by section 3 of the ordinance the city has reserved the right to acquire waterworks and engage in the business of supplying water to the inhabitants.

Little can be added to what has already been said in the brief of appellant heretofore filed with reference to this first claim. It appears from the recitals in the ordinance that the city advertised "for proposals for a water supply for said city and the inhabitants thereof"; that the Helena Consolidated Water Company made the best proposition in answer to the advertisement, and was awarded the contract. By section 8 of the ordinance the water company was required to provide twenty miles of mains within the limits of the city. Section 10 of the ordinance provides that "the said Helena Consolidated Water Company shall lay and maintain, in addition to the twenty miles of mains hereinbefore specified, such mains, of such sizes, at such times, and upon such streets, as the city council shall from time to time direct." In section 17 of the ordinance it is provided "that said company shall not refuse to permit connections to be made by, or to sell or deliver water to any persons who shall offer to pay for the same," etc. Section 10 of the ordinance clearly imposes a contractual obligation upon the grantee of the franchise, its successors and assigns, which would not exist independent of express contract. Sections 10 and 17 have to do with supplying water to the inhabitants, and by no process of reasoning can it be said that they are limited in their operation to a shorter period than the life of a franchise. These sections by themselves constitute a contract to supply all of the inhabitants with water during the existence of the franchise. The term of the agreement referred to in section 26 of the ordinance is the time during which extensions of

mains can be ordered and connections therewith made as provided in said sections 10 and 17.

If the argument advanced in behalf of appellee is sound, then either the contractual duty to make extensions of mains imposed by section 10 expired after the lapse of five years or the city could order extensions after five years but there was no obligation on the part of the water company to supply water through the same. In section 9 of the ordinance it is provided that "the water company shall maintain said hydrants during the continuance of this contract." If the contract was limited to the term of five years, then with the expiration of such term the hydrants could have been removed. It appears, however, from the record that after five years had elapsed the city applied for and procured to be issued a writ of mandamus, compelling the company to maintain the hydrants and furnish water for fire protection.

The argument advanced in behalf of the city, that the agreement referred to in section 26 is the agreement with the city for a supply for municipal purposes, completely overlooks the facts that the city advertised for proposals for a supply for both the city and the inhabitants; that a contract for this duplicate supply was awarded; and section 26 relates to the supply for the inhabitants.

With reference to the claim that the city has reserved the right to install water-works and compete with appellant. In order to sustain this claim, the argument is made that by section 3 of the ordinance the city has reserved the right to construct and maintain "works or plants of a public nature," which includes water-works. It will be noticed that the first five sections of the ordinance deal exclusively with the franchise granted. The remainder of the ordinance has to do with the contract to supply the city and its inhabitants with water. If the ordinance consisted merely of the first five sections referred to, there would be no doubt of the right of the city to install water-works, and engage in the business of supply-

ing its inhabitants with water. When, however, the other sections of the ordinance are considered,— which may be said to embrace the contract feature of the ordinance,— there can be no doubt that the city has waived or contracted away its right to supply water to the inhabitants.

It may be conceded for the sake of argument that the expression "works or plants of a public nature" includes water-works. As before stated, the city has the right, so far as Ordinance 248 is concerned, to acquire water-works to supply itself with water and supply its inhabitants after the expiration of twenty years, the term of the contract. If, however, the right to maintain water-works embraces the right to use the same for furnishing water to the inhabitants, as argued on behalf of appellee, then clearly the general expression "works or plants of a public nature" would be limited in its meaning so as to exclude water-works for supplying the inhabitants with water, thereby giving force and effect to the contract by the city that it will not engage in such business.

As shown in the original brief of appellant the city, in contracting for a supply of water for its inhabitants, exercised its private or business powers as distinguished from its public or governmental power; and, in construing Ordinance 248 to determine whether or not the city has waived its privilege of furnishing water to its inhabitants, the rule of strict construction invoked in behalf of appellee does not apply, but, on the contrary, the same rules and principles govern that are applicable to the contracts of private individuals. We again state that we do not claim any waiver on the part of the city of its privilege of furnishing water to the inhabitants by reason of the grant of the franchise. The claim we make is founded upon the contract with the city for a supply for the inhabitants, which it entered into in the exercise of its private or business powers.

It is claimed in the brief of appellant that this case is controlled by the decision in the Skaneateles case; and, in order

to make the two cases parallel and the said decision fit the case at bar, attention is called to the provision of Chapter 566 of the Laws of New York, 1890, referred to in the opinion of this Court in the case (184 U. S., p. 362). Chapter 566 did not take effect until May 1, 1891, and could not in any manner affect the relations between the village of Skaneateles and the Water Company which had theretofore become established and fixed. The provision of Chapter 566 of the Laws of 1890 is not referred to in the opinion of this Court as having any effect upon the rights of the parties to that case.

Considerable is said in the brief of appellee relative to what is termed the "Mandamus Case." That case had to do solely with the supply of water for the city, and did not, to any extent, involve the rights and obligations of the parties with reference to a supply for the inhabitants. Consequently, the questions presented in the case before the Court were not considered, and could not have been.

Respectfully submitted,

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